IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. [illegible] 52.

WILLIAM B. WETMORE,

Plaintiff-in-Error,

vs.

ANNETTE B. MARKOE (formerly Annette B. W. Wetmore),

Defendant-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR

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Supreme Court of the United States.

WILLIAM B. WETMORE,
Plaintiff-in-Error,

against

ANNETTE B. MARKOE (formerly Annette B. Wetmore),
Defendant-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR.

Statement of Facts.

This case is before the court pursuant to a writ of error duly issued on the 19th day of May, 1903, to review an order of the Appellate Division of the Supreme Court of the State of New York, dated and filed May 26, 1902, and the order of the Special Term of said Supreme Court thereby affirmed, dated and filed December 30, 1901, and all the other proceedings of said court at the Appellate Division and Special Term involved therein. The plaintiff-in-error applied for a permanent injunction and a perpetual stay of all proceedings on behalf of defendant-in-error to enforce the collection

of arrears of alimony and allowance prior to January 13, 1899, under a decree of divorce in favor of the defendant-in-error and against the plaintiff-in-error, entered in the Supreme Court on the first day of April, 1902, which application was by said court in all respects denied by the orders above-mentioned.

The application was made on the ground that the plaintiff-in-error had been discharged in bankruptcy and that said discharge operated to release him from such arrears of alimony and allowance (fols. 6-58).

The action in which said application was made was commenced in said Supreme Court, by the defendant-in-error here, against the plaintiff-in-error, on or about June 12, 1890, and on or about April 1, 1892, a decree was entered in said action granting to the plaintiff therein an absolute divorce, and directing the payment to her by the defendant therein of the sum of Three thousand dollars per annum by way of alimony, and the sum of one thousand dollars per annum for the support and maintenance of each of the three children of the parties to said action, during the minority of said children (fols. 43-58).

There was not reserved in said decree any right or privilege of subsequent modification or amendment (fols. 47-58).

On November 22, 1894, the defendant-in-error was married to Dr. James Wright Markoe, a physician in New York City (fol. 20).

Payments on account of the alimony and allowance thus granted the defendant-in-error were made to her from time to time from the income of a trust fund, originally of $100,000, created for the

benefit of the plaintiff-in-error, and sequestered in another action brought in equity by the defendant-in-error to reach the income thereof (fols. 63-66).

On January 13, 1899, there was due to the defendant-in-error from plaintiff-in-error, for arrears of alimony and allowance under said judgment of divorce, the sum of $19,221.60 (fols. 21-22). On that date the plaintiff-in-error, on his petition duly made to the District Court of the United States, for the Eastern District of Pennsylvania, was adjudicated a bankrupt under the United States Bankruptcy Act of July 1, 1898 (fols. 14, 32-34). The arrears above referred to, with the exception of $1,500 which became due January 1, 1899, were included in the schedule filed with said petition (fol. 22).

Defendant-in-error received due notice of the various steps in the bankruptcy proceeding, appeared therein and opposed the bankrupt's discharge, not proving her claim for arrears of alimony and allowance, but setting up another claim (fols. 62, 74-82). On June 21st, 1900, an order was duly made by the said District Court, discharging the plaintiff-in-error from all debts and claims made provable by the said Bankruptcy Act, and which existed on January 13, 1899 (fols. 32-35).

After such discharge, and on or about December 19, 1901, the plaintiff-in-error caused to be served on the attorneys for the defendant-in-error notice of an application to the Special Term of the Supreme Court of the State of New York, for the First Department, for an order enjoining and restraining all proceedings by or on behalf of the defendant-in-error, under said decree of divorce, for the collection of the aforesaid arrears of alimony (fols. 6-9). The application was in all respects de-

nied (fol. 262). The decision of the Special Term was solely on the merits, as appears from the memorandum decision of Mr. Justice Scott, based on cases already adjudicated and claimed to involve the question at issue (fol. 262).

From the order denying the motion the plaintiff in error appealed to the Appellate Division of the Supreme Court, for the First Judicial Department, which appeal resulted in the order of affirmance of May 26, 1902 (fols. 274-277).

The plaintiff in error thereupon appealed to the Court of Appeals, the highest judicial tribunal of the State, but of limited jurisdiction, and on June 27, 1902, his appeal was dismissed for want of jurisdiction without any affirmance or reversal on the merits (fols. 286-291), the defendant in error contending that the order was not appealable under Section 190 of the Code of Civil Procedure of the State of New York, as it was not an order finally determining an action or special proceeding, nor was it an order granting a new trial on exceptions (fol. 327/C-327/D).

The order of the Court of Appeals and the judgment on remittitur were duly made the order and judgment of the Special Term (fols. 292-297).

Before his time to appeal to the Court of Appeals had expired (fols. 307-310) the plaintiff in error applied, on October 24, 1902, to the said Appellate Division for leave to appeal to the Court of Appeals, and for the certification to that court, for decision, of the following question (fols. 301-305):

> "Was the claim of the plaintiff (defendant-in-error) for arrears of alimony and allowance under the decree of divorce in the above entitled action, which accrued prior to the filing

of his petition in bankruptcy by the defendant (plaintiff-in-error) or any part of said claim, extinguished by his discharge in bankruptcy?"

This application was denied on November 7, 1902, upon an argument by the defendant-in-error that the point had already been passed upon by various courts (fol. 327). Further progress in the New York courts was thereby barred under the State laws and procedure (fols. 328-334).

The plaintiff-in-error having therefore applied to the highest court of the State of New York in which he could obtain a decision of the question involved, and deeming himself aggrieved by the action of said court, presented his petition and assignment of errors to this court and obtained the writ of error herein (pp. 118-119).

As a question arising under a statute of the United States is involved, and a right, privilege and immunity claimed by the plaintiff-in-error under his discharge in bankruptcy has been denied, he therefore duly and respectfully presents his grievance to this court for review, to the end that the said orders may be reversed and said errors corrected by the mandate of this court.

Specification of Errors.

The plaintiff-in-error specifies the following assignments of error made upon his application to this court for writ of error, and upon which he will rely in the prosecution of his appeal:

I. The Appellate Division of the New York Supreme Court for the First Department erred in affirming, by its order of May 26, 1902, the order of the Special Term of said court made and entered

on December 30, 1901, and entitled in the action for divorce brought by the defendant-in-error against the plaintiff-in-error in said court.

II. The said court erred in not reversing said order of December 30, 1901, and granting to the plaintiff-in-error the injunctive relief prayed for upon his application herein, or some part thereof.

III. The said court erred in deciding that the plaintiff-in-error was not entitled to an order perpetually enjoining and restraining the defendant-in-error and her attorneys from taking any proceedings to in any way enforce the collection of the arrears of alimony and allowance which had accrued and become due to the defendant-in-error from the plaintiff-in-error on or prior to the 13th day of January, 1899, under the judgment of divorce entered on April 1, 1892, in favor of the defendant-in-error and against the plaintiff-in-error, or any part of such arrears, or to collect the judgment in said action so far as it related to such past due alimony and allowance.

IV. The said court erred in not deciding that the plaintiff-in-error was entitled to such injunctive relief as to such arrears and judgment, or some part of such relief.

V. The said court erred in deciding that such arrears of alimony and allowance were not a provable debt within the intent and meaning of the bankruptcy act of July 1, 1898, and in not deciding that such arrears were a debt which could be proved against the estate of the bankrupt.

VI. The said court erred in deciding that the discharge of the plaintiff-in-error under the bankruptcy

act of July 1, 1898, did not release the amount owing by the plaintiff-in-error to the defendant-in-error for such arrears of alimony and allowance or any part thereof, and in not deciding that the discharge of the defendant under the bankruptcy act of July 1, 1898, released the amount owing by the plaintiff-in-error to the defendant-in-error for such arrears of alimony and allowance, or some part thereof.

FIRST POINT.

Under the statutes and decisions of the State of New York, the claim of the defendant-in-error for alimony and allowance was a fixed liability, evidenced by a judgment.

(*a*) The decree of divorce of April 1, 1892, containing no provision by virtue of which it may be modified, altered or amended, became an absolute obligation, beyond the power or control of either the courts or the legislature to modify.

Walker v. Walker, 155 N. Y., 77.
Livingston v. Livingston, 173 N. Y., 377.

Section 1759 of the Code of Civil Procedure, as it read in 1892, when this decree of divorce was entered, provided that in an action for divorce brought by the wife, the court might, in the final judgment, make provision for the maintenance of the children of the parties and the support of the plaintiff. Subsequently, the section was so modified as to permit either party, upon the permission of the court, to apply for the annulment, variation

or modification of such decree, it was, however, held by the Court of Appeals in the case of Walker v. Walker, 155 N. Y., 77, that such amendment did not apply to any decree entered before its enactment which contained no provision for its subsequent modification. Martin, J., delivering the opinion of the court, referring to this section, said:

> "Under that statute, as well as under the Revised Statutes, after the entry of the final decree establishing the rights of the parties, the court had no power to order an additional allowance for the support of the wife. The jurisdiction of the court over the subject-matter of such an action and of the parties in respect to the matters involved in it, terminated with the entry of final judgment except as to proceedings for the enforcement of it or to correct any mistakes in the record."

A further amendment of the section in 1900 provided that such application for modification might be made in relation to judgments theretofore as well as thereafter entered. The Court of Appeals, in Livingston v. Livingston, 173 N. Y., 377, held that the amendment was unconstitutional so far as it sought to affect judgments theretofore entered, as it would deprive a party of property without due process of law. Mr. Justice Gray, writing the opinion of the court, said:

> "As Mr. Justice Cullen well expressed it, in his dissenting opinion at the Appellate Division, in Walker v. Walker (21 App. Div., 226):
>
> 'The plaintiff prior to the decree had a right of support. By her divorce she lost that right, and in substitution for it she acquired a new right, the judgment requiring the payment to her of a specific sum of money.'

> That right as a vested interest is property which the legislature is powerless to divest her of. If the interest is as it is claimed, an expectant one, being in the sense that the obligation of the defendant was a continuing one to pay alimony in the future, nevertheless the interest was one fixed by the judgment, and was not a mere contingency. It was not a capacity to acquire a right for the payment of money; it was a right fixed by the judgment, and hence vested in the plaintiff."

(*b*) So absolute is this obligation that it is not affected by the marriage of the wife.

> Shepherd v. Shepherd, 1 Hun, 240; affirmed 58 N. Y., 644.

(*c*) It is an obligation collectible by the levying of an execution.

> New York Code of Civil Procedure, Section 1240.
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> Miller v. Miller, 7 Hun, 208.

Section 1240 of the Code of Civil Procedure, so far as material, provides:

> "In either of the following cases a judgment may be enforced by execution:
>
> "1. Where it is for a sum of money in favor of either party, or directs the payment of a sum of money."

(*d*) The defendant-in-error is regarded as a judgment-creditor.

> Wetmore v. Wetmore, 149 N. Y., 520.

In the case just cited, the defendant-in-error brought an action to sequester the income of a trust fund created for the benefit of the plaintiff-in-

error, to secure the payment of her alimony. The Court of Appeals held that she was entitled to reach the surplus of the trust fund under Section 57 of the Revised Statutes, which provided that an income of a trust in lands beyond what should be necessary for the support, etc., of the beneficiary,

> "shall be liable in equity to the claims of creditors of such persons in such manner as other personal property which cannot be reached by an execution at law."

Mr. Justice Haight, in this case, delivering the opinion of the court, said (see pages 525-528):

> "After the sum of $4,500 of alimony had become due and payable a judgment was entered against him in favor of the plaintiff for that amount, on which an execution was issued and returned unsatisfied. * * * As we have seen, a judgment has been entered in her favor for the alimony that had become due and payable. She is, therefore, as to that amount, a judgment-creditor and entitled to avail herself of all the remedies given by the statute. * * *
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> "* * * Inasmuch as the judgment entered for alimony past due does not cover all of the alimony that has accrued and is provided for in the judgment entered in this action, it becomes necessary to determine the effect of the judgment in the divorce action, awarding alimony to the plaintiff. * * *
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> "* * * It will thus be seen that the awarding of alimony is not on account of any prior debt due and owing from the husband to the wife, but it is based upon a duty devolving upon the husband to support her. And that in awarding judgment against him the court determines the amount necessary for such support, and requires the amount so fixed to be paid to her.

> His duty is thus determined. And from that time on he is in effect a debtor, owing his wife the amount adjudged and determined by the decree. Whilst such amount is in effect the property of a wife, yet it being created and protected by a decree, it cannot be reached by prior existing creditors."

It is respectfully submitted, therefore, that in New York, whatever may be the nature of a claim for alimony elsewhere, the decree awarding alimony in this case imposed upon the plaintiff-in-error a fixed liability, evidenced by a judgment. As neither the decree itself nor the statute under which it was entered contained any provision for subsequent modification, the debt created by the judgment is fixed and unalterable, and as to the amounts past due, absolutely owing.

SECOND POINT.

The arrears of alimony which accrued prior to January 13, 1899, were a provable debt within the provisions of the United States Bankruptcy Act, and were released by the discharge in bankruptcy granted to the plaintiff-in-error.

(1) Section 17 of the Bankruptcy Act, prescribing what debts shall be released by a discharge in bankruptcy, read at the time of the filing of the petition of the plaintiff-in-error and the granting of his discharge, as follows:

> "A discharge in bankruptcy shall release a bankrupt from all of his *provable debts*, except such as (1) are due as a tax levied by the

United States, the State, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretense or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

Clearly the claim for arrears of alimony and allowance is not included within any class of debts excepted from the operation of the statute, and it is equally clear from the language of the Act that all provable debts not explicitly excepted are discharged. The right of the plaintiff-in-error therefore depends upon whether or not the arrears are a provable debt.

Section 1 of the Act defines a "debt" as including "any debt, demand or claim provable in bankruptcy."

Section 63 of the Bankruptcy Act prescribes the classes of debts which may be proved against a bankrupt's estate. The only provision applicable here, at the time the plaintiff-in-error was adjudicated a bankrupt, is as follows:

"Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

Since under the New York law alimony is a fixed liability, evidenced by a judgment, conferring a vested right to enforce payment, it is unquestionably a demand. It seems impossible, therefore, to regard it otherwise than as a debt under the Bankruptcy Act.

That it was the intention of Congress originally to allow a claim for alimony to be proved against the estate of a bankrupt husband seems evident from the recent amendment of the Bankruptcy Act, passed in 1903, which in terms provides that a discharge in bankruptcy shall not operate as a release of alimony due or to become due. If that were already the law, under all circumstances, this amendment was unnecessary and superfluous.

While under Section 63 the classes of debts which are provable remain unchanged, by the amendment to Section 17 the class of provable debts not discharged is enlarged so as to include a claim for alimony. Such a claim is, in terms, exempted as a "provable debt," the wording of the section, so far as material, now being:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities * * * for alimony due or to become due, or for maintenance or support of wife or child. * * *"

All debts now provable were provable prior to the amendment of Section 17, which amendment is a recognition of the fact that claims for alimony were and are still provable under Section 63. The claim of the divorced wife thus being provable, it was clearly discharged by Section 17, as it cannot be contended that until the passage of the amendment of 1903 there was a clause in Section 17 which

would relieve from the operation of said section the claim for alimony if it were provable under Section 63. Congress had expressly excepted certain classes of judgments from the operation of the Act, as set out in Section 17, such as those founded upon wilful and malicious injuries to the person or property of another, fraud, embezzlement, and the like. To except from "provable debts" judgments in actions of such a nature, surely established the judgments as debts provable but not discharged. Whatever the nature of the original claim, by its reduction to judgment it becomes a debt. A person who has committed an assault and battery upon another is no more the debtor of that other than is a husband the debtor of his wife, nor even under any moral obligation to pay exemplary damages for the tort. But it cannot be contended that after judgment had been rendered for such exemplary damages the defendant would not be the debtor of the plaintiff. That Congress so regarded the relation is shown by the fact that it excepted such a judgment from the provable debts that were released by the discharge.

Here also the rule "*Expressio unius est exclusio alterius*" applies. In excluding particular judgments in Section 17 of the Act, it must be assumed that Congress intended to include all others. Decrees respecting alimony being there omitted were impliedly included as provable and discharged.

But whatever may have been the intention of Congress, the plaintiff-in-error is entitled to the benefit of the provisions of the Act as it stood when his petition was filed, which provisions, regarding excepted debts, were surely of more limited effect than those of the Act as now amended.

In Re Houston (94 Fed., 119), decided by the District Court for Kentucky, it appeared that the judgment of divorce was obtained in Kentucky, where a judgment for alimony is of the same nature as in New York State, and the court in its opinion said:

> "And it should not be overlooked that the Court of Appeals of Kentucky, in the case of Tyler vs. Tyler, 99 Ky., at page 34; 34 S. W., 899, in speaking of a judgment against the husband for alimony, said that it 'makes him an ordinary debtor to the wife for a fixed sum of money, that his estate is liable for in the same manner that it would be for a debt upon any contract.'"

In holding that an order of the Bankruptcy Court in that matter, enjoining and staying all proceedings in the State court for the collection of alimony, should be enforced, the District Court said:

> "Section 1 of the act provided that the word 'debt' shall include any debt, demand or claim provable in bankruptcy, and also that the word 'discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, subject to the exceptions named in the act. Whether wisely or unwisely, Congress did not, in fact, in Section 63, distinguish between judgments for alimony and other judgments, when including them in the list of provable debts; nor did it, in Section 17, include judgments of that class among those not to be affected by a discharge in bankruptcy."

In Re Van Orden, 96 Fed., 86, related to arrears accrued under a judgment of a New York court awarding a divorce and alimony, and which arrears the wife of the bankrupt sought to enforce

in New Jersey, where the bankrupt had taken up his residence. The United States District Court in New Jersey, in holding that her proceedings should be stayed, said:

> "Section 1 of the Bankrupt Act of 1898 provides that a 'discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy except such as are excepted by this act. The debts which are excepted and referred to in Section 1 are to be found specifically set out in Section 17 of this act. It is admitted, and, if it were not, it would be perceived at a glance, that the debt of Mrs. Van Orden is not included in any of the excepted classes. The only question before the court, then, is whether the debt for which Mrs. Van Orden has brought her suit against the bankrupt is one provable in bankruptcy."

After referring to the provisions of the Act as to what debts were provable, the court further said:

> "The support and maintenance of a wife by the husband is an ever-recurring liability from which he cannot by any act of his be freed. It is an obligation founded in law and justice, which may be enforced by action. Until the necessity for its enforcement arises, the extent of this liability is vague and uncertain; but when the aid of the court has been invoked, and it awards alimony, it thereby determines the amount of the husband's liability, and by its judgment or decree requires the amount so fixed to be paid the wife for her maintenance and support. 'From that time the husband is, in effect, a debtor, owing his wife the amount adjudged and determined in the decree' (*Wetmore v. Wetmore*, 149 N. Y., 521; 44 N. E., 170). That which before was a mere liability now becomes a debt. The judgment establishes the indebtedness, and makes fixed and certain

that which was before uncertain, and becomes the evidence of the debt which it creates" (*Black v. McClellan*, 12 N. B. R., 431, Fed. Cas. No. 1462; *Zimmer v. Schleehauf*, 115 Mass., 52; *Crouch v. Gridley*, 6 Hill, 250; *Nicholas v. Dissler*, 31 N. J. Law, 473).

In re Challoner, 98 Fed., 82, it was also held that arrears of alimony are a debt under the bankrupt law. The divorce under which the controversy arose was granted in Illinois, where arrears of alimony are a fixed debt, which cannot be reduced, under the authority of Craig v. Craig, 163 Ill., 176.

It is important to notice in this connection the difference in the language used in the Act of 1867 and that in the Act of 1898. So far as the question here presented is concerned, the Act of 1867 provided:

> "That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. * * * No debts other than those above specified shall be proved or allowed against the estate" (Sec. 19).

The Act left it to be determined by the courts what should constitute a debt within the meaning of the Act. Whereas, the present Act clearly defines a "debt" to be "any debt, demand or claim provable in bankruptcy." Therefore, in Section 63, where the phrase "debts of the bankrupt" is used, the clause should be construed as if reading:

> "Debts, demands or claims against the bankrupt may be proved and allowed against his estate which are a fixed liability as evidenced

> by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him."

The Act of 1867, so far as it referred to all debts due and payable and all demands against the bankrupt that were provable under that Act, raised questions of doubtful construction which were apparently appreciated by Congress when it enacted the Bankruptcy Law of 1898, for under the Act of 1867, Section 19, it was not defined, as in Section 63 of the present Act, that among others of such debts are:

> "(1) A fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition."

Sections 63 and 17 of the present Act must be read together, for it is clear that it is not every fixed liability as evidenced by a judgment which, though provable, is affected by the discharge, but it does clearly appear that all debts which are fixed liabilities as evidenced by a judgment are provable under the present Act.

(2) The exact question here involved has never been passed upon adversely to the contention of the plaintiff-in-error.

The cases in which the general subject has been considered, and which may appear to be in opposition to the contention of the plaintiff-in-error, are the following:

> Dunbar v. Dunbar, 190 U. S., 340.
> Audubon v. Shufeldt, 181 U. S., 575.
> *In re* Lachemeyer, 18 N. B. R., 270.
> *In re* Nowell, 99 Fed., 931.
> Menzie v. Anderson *et al.* (1879), 65 Ind., 239.

Noyes v. Hubbard (1892), 64 Vermont, 302.
Barclay v. Barclay (1900), 184 Ill., 375.
Kerr v. Kerr (1897), 2 Q. B. Div., 439.

In Dunbar v. Dunbar, 190 U. S., 340, no claim was made for the arrears accrued prior to the date when the defendant was adjudged a bankrupt. In an action by the plaintiff to recover arrears accruing under the contract subsequent to that date, the court held that the defendant's discharge in bankruptcy was no defense.

An analysis of the remaining cases discloses that in every one of them, with the exception of Menzie v. Anderson (65 Ind., 239), and Noyes v. Hubbard (64 Vermont, 302) the fact appeared and was made the basis of the decision, that the alimony was not fixed and unchangeable. In the two last mentioned cases the court held that alimony was not a "debt growing out of or founded upon a contract express or implied." It is not contended by plaintiff in error that it is a debt of that character; under the present Act it is not necessary that it should be so regarded; but it is a debt fixed and finally determined by the judgment.

In Audubon v. Shufeldt, it appeared that the judgment of divorce was obtained in Maryland. The bankrupt afterwards took up his residence in the District of Columbia, where he prosecuted his bankruptcy proceedings. The bankruptcy court held that arrears of alimony which accrued prior to the adjudication of bankruptcy were a provable debt. Mr. Justice Gray, delivering the opinion of the Supreme Court reversing the order

granting a discharge covering arrears of alimony, said, at page 577:

> "Generally speaking alimony may be altered by that court at any time as the circumstances of the party may require. * * * In the State of Maryland and in the District of Columbia alimony is granted by a decree of a court of equity (citing the authorities) and as the Court of Appeals of the District of Columbia has more than once said, 'the allowance of alimony is not in the nature of an absolute debt; *it is not unconditional and unchangeable; it may be changed in amount even when in arrears, upon good cause shown to the court having jurisdiction.*'"

And quoting from the opinion in Barclay v. Barclay (184 Ill., 375), Mr. Justice Gray said:

> "The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. Hence such alimony cannot be regarded as a debt owing from the husband to the wife, and not being so cannot be discharged by an order in the bankruptcy court."

In the Lachmeyer case, 18 N. B. R., 270, the leading authority under the Bankruptcy Act of 1867, the decree contained a provision allowing either party to apply to the court for a modification of the decree upon the happening of any event changing the circumstances of the parties (see page 270).

Judge Choate in deciding that a claim for alimony was not a provable debt in bankruptcy, in terms confined his decision to a case where the ali-

mony was not an absolute fixed obligation, basing his decision upon the reservation contained in the decree. In his opinion, at page 272, he says:

> "The weight of authority at present, therefore, clearly is that a positive obligation to pay a certain sum of money, liquidated, and for which an action will lie, though not based upon *contract, nor growing out of contract,* is a provable debt under the present bankruptcy law (referring to the Act of 1867); but these later authorities have given a more extended construction to the word 'debt' under the present bankrupt law than was given to the same word in the law of 1841 by the District Court of Connecticut *in re* Cotton, *ut supra,* where a judgment for seduction was held not provable.
>
> "But the claim for arrears of alimony is in some respects different from any of the obligations held provable in the cases above cited. It is not generally enforceable by action, but by process for contempt. If the obligation to pay the overdue alimony was an absolute obligation and enforceable in a personal action it would seem to be within the cases cited above * * *. It seems, however, that one of the reasons why an action will not ordinarily lie to enforce a decree of alimony is that from the peculiar character of the obligation, the decree is always subject to modification by the court in which the decree was entered according to the varying circumstances of the parties, and that no other court can undertake to administer the relief to which the parties are entitled except the court which has jurisdiction of the original suit. * * * The case as to overdue alimony is not free from doubt, but upon the whole, I am of opinion that it is not a provable debt within the meaning of the bankrupt law *because not an absolute obligation enforceable by action.*"

Judge Lowell, in delivering the opinion *in re* Nowell, 99 Fed. Rep., 931, put his decision distinctly on the ground that alimony was not, in the case before him, fixed and unchangeable. He said (933-934):

> "Is a claim for arrears of alimony which has been decreed by a court of Massachusetts released by a discharge in bankruptcy? As has been said, these arrears are not, prior to the issue of an execution to collect them, a fixed liability absolutely owing; for the amount of the liability may be modified by the court which has decreed the alimony and issues the execution. Even arrears of alimony, therefore, are not a provable debt within the letter of the present bankrupt law, and upon the whole, the decisions concerning alimony and bankrupt laws in general hold alimony not to be provable. * * *
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> "Under the Act of 1898 have been made several decisions supposed to favor the defendant's contention in this case."
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> "*In re* Houston (D. C.), 94 Fed., 119, the District Court of Kentucky discharged a bankrupt from an arrest made by order of the State court to enforce the payment of alimony and imposed, and the opinion is devoted to the vindication of the unquestionable authority of the District Court, under proper conditions, to release an individual from arrest by the State Court, and incidentally the court decided that alimony was a provable debt. The decision was based on the authority of Tyler v. Tyler, where it was said that a judgment for alimony 'makes him (the husband) an ordinary debtor to the wife for a fixed sum of money that his estate is liable for in the same manner that it would be for a debt upon contract.'
>
> "If this is the nature of alimony in Kentucky, a claim for arrears of alimony may well be barred by a discharge in bankruptcy, but

this is not the nature of alimony in Massachusetts; *in re* Houston is here inapplicable.

"*In re* Van Orden, 96 Fed., 86, the bankrupt sought to enjoin his wife from prosecuting in New Jersey a suit in equity to recover arrears of alimony decreed by a State Court of New York, and the District Court of New Jersey granted an injunction. In that case the liability was apparently fixed, inasmuch as its enforcement was sought in an independent suit in which no modification of the original decree could be obtained. The decision has therefore no bearing on the present case, although the learned judge doubtless expressed his opinion that arrears of alimony in general are a provable debt."

It is true that in England alimony is not discharged by bankruptcy, but it is for the reason that alimony, whether in arrears or not, is entirely under the control of the court which originally decreed its payment.

Kerr v. Kerr (1897), 2 Q. B., 439, 443-444.

THIRD POINT.

The remedy of plaintiff-in-error was properly sought in the court in which the judgment was entered.

Moore v. Upton, 50 N. Y., 593.
Palmer v. Hussey, 119 U. S., 96.

In Palmer v. Hussey, *supra*, the plaintiff-in-error after his discharge in bankruptcy, applied to the state court for an order perpetually enjoining and restraining the defendant-in-error from enforcing

the judgment previously obtained against him on the ground that it was extinguished by his discharge. The motion was denied at the Special Term, but reversed by the Court of Appeals and the motion granted. On writ of error of the United States Supreme Court that court sustained the order of the Court of Appeals.

FOURTH POINT.

The Appellate Division of the Supreme Court is the highest court of the State of New York in which a decision could be had by the plaintiff-in-error.

The plaintiff-in-error took his appeal originally as a matter of right, and the dismissal by the Court of Appeals, without any consideration of the merits, was a repudiation of its jurisdiction of the appeal. The subsequent refusal of the Appellate Division to certify the question to the Court of Appeals left the plaintiff-in-error without recourse to any court higher than the Appellate Division.

It is held that where a decision cannot be obtained from the highest court of the state, the writ of error should be directed to the lower court rendering the decision.

> Bacon v. Texas, 163 U. S., 207.
> Mo., Kan. & Tex. Ry. Co. v. Elliott, 184 U. S., 530.

The plaintiff-in-error here exhausted every means of obtaining a decision by the Court of Appeals on his application. From the decision of the Appellate Division affirming the order of the Spec-

ial Term, he appealed to the Court of Appeals. That appeal was taken promptly, and was submitted to the Court of Appeals on June 11, 1902, and dismissed by that court on June 27, 1902, and before his time to appeal had expired, he applied to the Appellate Division for leave to appeal to the Court of Appeals, and for the certification to that court by the Appellate Division of the question involved. Upon the refusal of that application plaintiff-in-error could present his application to no higher court of the State.

On the questions of jurisdiction of the Court of Appeals and limitation of time to appeal, the following Sections of the Code of Civil Procedure of the State of New York apply:

> Sec. 190. "* * * From and after the last day of December, 1895, the jurisdiction of the Court of Appeals shall in civil actions and proceedings be confined to the review upon appeal of the actual determinations made by the Appellate Division of the Supreme Court in either of the following cases and no others:
>
> "1. Appeals may be taken as of right to said court from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them.
>
> "2. Appeals may also be taken from determinations of the Appellate Division of the Supreme Court in any department where the Appellate Division allows the same and certifies that one or more questions of law have arisen which in its opinion ought to be reviewed by the Court of Appeals in which case the appeal brings up for review the question or questions so certified and no other; and the Court of

Appeals shall certify to the Appellate Division its determination upon such question."

Section 191. "* * * The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

"1. No appeal shall be taken to said court in any civil action or proceeding commenced in any court other than the Supreme Court, Court of Claims, County Court or a Surrogate's Court unless the Appellate Division of the Supreme Court allows the appeal by an order made at the term which rendered the determination or at the next term after judgment is entered thereupon and shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

"2. * * *

"3. The jurisdiction of the court is limited to a review of questions of law."

Sec. 1325. "* * * An appeal to the Court of Appeals from an order must be taken within sixty days after service upon the attorney for the appellant of a copy of the order appealed from and a written notice of the entry thereof."

The order with notice of entry was never served upon the plaintiff-in-error, so that his time to appeal had not expired when his motion for leave to go to the Court of Appeals was refused.

FIFTH POINT.

The plaintiff-in-error should be held and adjudged released and discharged from all arrears of alimony and allowance for maintenance accrued on January 13, 1899; the order of the Special Term of the Supreme Court of the State of New York, dated December 30, 1901, and the affirming order of the Appellate Division of said court of May 26, 1902, should be reversed and the cause remanded to said Supreme Court of the State of New York, with directions and instructions for granting to plaintiff-in-error the perpetual stay and injunction prayed for, and to take such other and further proceedings not inconsistent therewith as may be proper, with costs.

All of which is respectfully submitted.

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Dated October 3, 1904.